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4 UNITED STATES DISTRICT COURT
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7 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,
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Case No. 3:15-cr-00047-HDM-WGC

12 v. Plaintiff,
13

14 ORDER
15 BRETT ALAN MILLER,
16

17 Defendant.
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20 Defendant Brett Alan Miller has filed a motion to vacate, set
21 aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No.
22 38). The government has opposed (ECF No. 40), and Miller has
23 replied (ECF No. 41).

24 In May 2015, Miller was charged with three counts of felon in
25 possession of a firearm in violation of 18 U.S.C. § 922(g)(1).
26 (ECF No. 10). Pursuant to an agreement, Miller pled guilty to one
27 count of felon in possession. (ECF Nos. 26 & 28). He was sentenced
28 to a term of 77 months, followed by three years of supervised
release. (ECF No. 34).

Section 922(g) prohibits the possession of firearms by
several categories of persons, including any person who has been
convicted in any court of a crime punishable by a term of more
than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his
conviction, Miller had two prior felonies, including a 2010 federal
bank robbery charge that resulted in a 46-month sentence. Miller
was in fact on supervised release for the 2010 conviction when he
committed the instant offense. See Case No. 3:10-cr-00038-HDM.

1 When Miller was charged and entered his plea in this case,
 2 the government was not required to prove that he knew he was a
 3 felon. *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003).
 4 But in 2019, the U.S. Supreme Court concluded that a defendant may
 5 be convicted under § 922(g) only if the government proves that the
 6 defendant "knew he belonged to the relevant category of persons
 7 barred from possessing a firearm." *Rehaif v. United States*, 139 S.
 8 Ct. 2191, 2200 (2019). On the basis of *Rehaif* and the government's
 9 failure to charge or prove his knowledge of status, Miller now
 10 moves to vacate his conviction.

11 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
 12 vacate, set aside, or correct his sentence if: (1) the sentence
 13 was imposed in violation of the Constitution or laws of the United
 14 States; (2) the court was without jurisdiction to impose the
 15 sentence; (3) the sentence was in excess of the maximum authorized
 16 by law; or (4) the sentence is otherwise subject to collateral
 17 attack. *Id.* § 2255(a).

18 Miller alleges that the omission of the *Rehaif* element from
 19 the indictment and plea colloquy violated his Fifth Amendment
 20 rights guaranteeing that a grand jury find probable cause to
 21 support all the necessary elements of the crime and his Sixth
 22 Amendment rights to notice of the charges and effective assistance
 23 of counsel. He also alleges that the defective indictment deprived
 24 the court of jurisdiction and that his plea was not knowing and
 25 voluntary. The government responds by asserting that Miller has
 26 waived his right to bring these claims and that his claims are
 27 procedurally defaulted.

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1 As part of his plea, Miller "waive[d] all collateral
 2 challenges, including any claims under 28 U.S.C. § 2255, to his
 3 conviction, sentence, and the procedure by which the Court
 4 adjudicated guilt and imposed sentence, except non-waivable claims
 5 of ineffective assistance of counsel." (ECF No. 26 at 15). Such
 6 "[a]n unconditional guilty plea waives all non-jurisdictional
 7 defenses and cures all antecedent constitutional defects, allowing
 8 only an attack on the voluntary and intelligent character of the
 9 plea." *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir.
 10 2013); *see also United States v. Espinoza*, 816 Fed. App'x 82, 85
 11 (9th Cir. June 1, 2020) (unpublished disposition) (unconditional
 12 plea waiver precludes all Fifth and Sixth Amendment claims except
 13 to the extent they contest the court's jurisdiction or the
 14 voluntariness of the plea). Thus, except to the extent Miller
 15 attacks the jurisdiction of the court, alleges that his plea was
 16 not knowing and voluntary, or asserts ineffective assistance of
 17 counsel, his claims are waived.¹

18 Miller's jurisdictional argument is without merit. The
 19 omission of an element from the indictment does not affect the
 20 court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630
 21 (2002); *United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir.
 22 2003); *see also United States v. Burleson*, 2020 WL 4218317, at *1
 23 (July 23, 2020) (unpublished disposition) (rejecting the
 24 defendant's argument that omission of the *Rehaif* element deprived
 25 the district court of jurisdiction); *Espinoza*, 2020 WL 2844542, at

26
 27 ¹ Miller asserts that his waiver was not valid because the omission of
 28 the *Rehaif* element rendered his plea unknowing and involuntary. As more
 fully discussed *infra*, the court does not find this argument to be
 persuasive.

1 *1 (same). *Cf. United States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission of *Rehaif* element from indictment for plain error).

4 Miller's claim that his plea was not knowing and voluntary is 5 procedurally defaulted. "If a criminal defendant could have raised 6 a claim of error on direct appeal but nonetheless failed to do so, 7 he must demonstrate" either "cause excusing his procedural 8 default, and actual prejudice resulting from the claim of error," 9 *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or 10 that he is actually innocent of the offense, *Bousley v. United 11 States*, 523 U.S. 614, 622 (1998).

12 "[C]ause for a procedural default on appeal ordinarily 13 requires a showing of some external impediment preventing counsel 14 from constructing or raising the claim." *Murray v. Carrier*, 477 15 U.S. 478, 492 (1986). Actual prejudice "requires the petitioner to 16 establish 'not merely that the errors at ... trial created a 17 possibility of prejudice, but that they worked to his actual and 18 substantial disadvantage, infecting his entire trial with error of 19 constitutional dimensions.'" *Bradford v. Davis*, 923 F.3d 599, 613 20 (9th Cir. 2019) (internal citation omitted).

21 Miller could have challenged the validity of his plea on 22 direct appeal but did not do so. The claim is therefore 23 procedurally defaulted.² It is unnecessary to resolve whether

24 ² Miller argues that his claims are not procedurally defaulted, relying 25 on *English v. United States*, 42 F.3d 473, 479-81 (9th Cir. 1994). *English* 26 concluded that the defendants' claim, which was based on new Supreme 27 Court law, was not defaulted because no procedural rule required the claim to be raised on direct appeal. The court finds Miller's reliance on *English* unavailing. As a subsequent Ninth Circuit panel recognized:

28 *English* was in fact careful to limit its holding to the state of the law in 1989, which was relevant because of the

1 Miller can demonstrate cause for the default, because even if he
 2 could, he cannot demonstrate prejudice.³

3 Miller committed the instant offense less than two years after
 4 his release from a 46-month bank robbery sentence. Miller
 5 acknowledged in his plea agreement that he had been previously
 6 convicted of a felony. Even more importantly, however, he
 7 acknowledged during his plea colloquy both that he had a prior
 8 conviction and that he was aware at the time of his offense that
 9 he was not allowed to possess a firearm. In light of Miller's
 10 admissions that he knew he was a convicted felon and that he was
 11 prohibited from possessing firearms, as well as his lengthy and
 12 recent prior sentence, the court is not persuaded that the
 13 inclusion of the *Rehaif* element in these proceedings would have
 14 changed Miller's decision to plead guilty or that his plea was
 15 involuntary as a result of the omission.

16 Miller appears to recognize as much and primarily argues
 17 instead that the omission is structural error such that he is not
 18 required to demonstrate prejudice to obtain relief.

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21 procedural posture of that case; as *English* itself noted, by
 22 1994 the law might well have moved beyond the 'rule violation'
 23 requirement it recognized. . . . We recognize that *Bousley*
 24 (and our *Johnson* case before it) reflect the current state of
 25 the law: most claims are procedurally defaulted by both
 26 federal and state prisoners in habeas proceedings when not
 27 raised on direct appeal, absent a showing of cause and
 28 prejudice or actual innocence.

29

30 *United States v. Braswell*, 501 F.3d 1147, 1150 n.1 (9th Cir. 2007).
 31 However, even if, under *English*, the claims should not be considered
 32 procedurally defaulted, the court would deny the motion on the
 33 independent basis that it is entirely without merit, for all the reasons
 34 discussed herein.

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³ Miller does not argue actual innocence.

1 "[C]ertain errors, termed structural errors, might affect
 2 substantial rights regardless of their actual impact on an
 3 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263
 4 (2010) (internal punctuation and citations omitted). Thus,
 5 structural error "warrant[s] habeas relief without a showing of
 6 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-
 7 64 (9th Cir. 2011). "But structural errors are a very limited class
 8 of errors that affect the framework within which the trial
 9 proceeds, such that it is often difficult to assess the effect of
 10 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and
 11 citations omitted). Cases in which the Supreme Court has found
 12 structural error include total deprivation of counsel, lack of an
 13 impartial trial judge, violation of the right to a public trial
 14 and an erroneous reasonable-doubt instruction. *See id.* (discussing
 15 cases). In contrast, errors that have been found to be non-
 16 structural include where the court instructed on an invalid
 17 alternative theory of guilt, gave an instruction omitting an
 18 element of the offense, or erroneously instructed the jury on an
 19 element. *Id.* at 264 (discussing cases).

20 The Ninth Circuit has not yet addressed whether omission of
 21 the *Rehaif* element from the indictment or the plea colloquy is
 22 structural error. But the Third, Fifth, Seventh, Eighth, and Tenth
 23 Circuits have concluded it is not. *United States v. Nasir*, -- F.3d.
 24 --, 2020 WL 7041357, at *19, n.30 (3d Cir. Dec. 1, 2020); *United*
 25 *States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *United*
 26 *States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United States*
 27 *v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v.*
 28 *Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); *see also United*

1 States v. Watson, 820 Fed. App'x 397, 400 (6th Cir. 2020)
 2 (unpublished disposition). But see *United States v. Gary*, 954 F.3d
 3 194, 206 (4th Cir. 2020). The court agrees with the well-reasoned
 4 opinions of these several circuit courts, as well as the district
 5 courts that have addressed the issue, and concludes that a *Rehaif*
 6 error does not fall within the limited class of errors the Supreme
 7 Court has found to be structural.⁴

8 Finally, Miller asserts that that the *Rehaif* error deprived
 9 him of effective assistance of counsel in violation of the Sixth
 10 Amendment. For the reasons already discussed, Miller has not shown
 11 a reasonable likelihood of a different outcome had counsel been
 12 aware of the *Rehaif* element. See *Strickland v. Washington*, 466
 13 U.S. 668, 696 (1984). Accordingly, to the extent Miller raises a
 14 claim of deprivation of effective assistance of counsel, that
 15 claim, too, is without merit.

16 Accordingly, because the claims raised in Miller's § 2255
 17 motion are waived, procedurally defaulted and/or without merit, IT
 18 IS THEREFORE ORDERED that the motion to vacate, set aside or
 19 correct sentence (ECF No. 38) is hereby DENIED.

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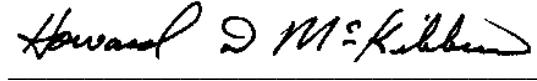
23 ⁴ The Ninth Circuit decisions cited by Miller are not to the contrary.
 24 Each of these cases, and the cases on which they rely, held that defects
 25 in the indictment are structural error only if timely raised, and they
 26 each explicitly recognized that if the objection to the indictment is
 27 not raised until direct appeal, it is subject to plain error review.
 28 See, e.g., *United States v. Du Bo*, 186 F.3d 1177, 1179 & 1180 n.3 (9th
 Cir. 1999) ("We hold that, if properly challenged prior to trial, an
 indictment's complete failure to recite an essential element of the
 charged offense is not a minor or technical flaw subject to harmless
 error analysis, but a fatal flaw requiring dismissal of the indictment.
 . . . Untimely challenges to the sufficiency of an indictment are
 reviewed under a more liberal standard.").

1 IT IS FURTHER ORDERED that Miller is DENIED a certificate of
2 appealability, as jurists of reason would not find the court's
3 denial of the motion to be debatable or wrong.

4 The Clerk of Court shall enter final judgment accordingly.

5 IT IS SO ORDERED.

6 DATED: This 8th day of December, 2020.

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UNITED STATES DISTRICT JUDGE

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